No. 75-1767

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

Y. HATA & COMPANY, LIMITED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. i-x) is reported at 535 F. 2d 508.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1976. The petition for a writ of certiorari was filed on June 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners offered any evidence at trial which would support an instruction on the disputed theory that they were entitled to acquittal if it was objectively impossible for them to take any action to prevent insanitary conditions at the Y. Hata & Company food warehouse.

2. Whether the Fifth Amendment to the Constitution requires a federal prosecutor to present exculpatory material in his possession to a grand jury.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Pertinent portions of the Fifth Amendment to the Constitution and of Sections 301(k), 303, and 305 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042, 1043, and 1045, as amended, 21 U.S.C. 331(k), 333, and 335, are set forth at Pet. 2-4.

Section 402(a)(4) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, as amended, 21 U.S.C. 342(a)(4), provides:

> A food shall be deemed to be adulterated—
>
> * * * if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; * * * .

STATEMENT

After a jury trial in the United States District Court for the District of Hawaii, petitioners, a corporation and its president, were convicted on one count of a three-count indictment for causing food to become adulterated by being held under "insanitary conditions," in violation of Section 301(k) of the Federal Food, Drug, and Cosmetic Act.[1] Corporate petitioner, Y. Hata & Company, which had previously been convicted of a violation of the Act, was convicted of a felony and

[1]Charges against a third defendant, an employee of Y. Hata & Company, were dismissed.

fined $3,000. Individual petitioner, Minoru Hata, was convicted of a misdemeanor and fined $500. The court of appeals affirmed (Pet. App. i-x).

The facts, not disputed in this petition, are that Y. Hata & Company placed rice in a warehouse which was accessible to rodents, birds, and insects. An FDA official who inspected the warehouse in May and June 1972 testified that birds were flying in and out of the warehouse, perching over stored food, and eating from bags of rice. Bird excreta were found on some of the bags (Pet. App. ii).

ARGUMENT

This case does not present any question warranting review by this Court.

1. Petitioners contend here, as they did below, that they were entitled to an instruction on the "impossibility defense" referred to in *United States* v. *Park*, 421 U.S. 658, 673. In *Park*, the Court held that "the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Id.* at 672. It also observed that although the duty imposed "requires the highest standard of foresight and vigilance," the Act "in its criminal aspect, does not require that which is objectively impossible." *Id.* at 673. Petitioners interpret this *dictum* to mean that a showing of the physical impossibility of correcting the insanitary condition would entitle defendants to an acquittal.

Without reaching the government's interpretation of *Park*,[2] the court of appeals properly rejected petitioners' argument because they failed to present evidence which would warrant such an instruction even if their legal theory were correct. That court noted that Y. Hata & Company solved its bird infestation problem with a wire cage some time after the FDA inspection which led to the convictions. The court said "[t]here was no proof or offer to prove that the wire cage system could not have been implemented long before the FDA inspections in May and June 1972" (Pet. App. viii).

The court of appeals rested its decision upon the principle that a district judge is not required to give an instruction with respect to a possible affirmative defense if a defendant fails to present evidence to support the defense. That principle is correct and petitioners do not dispute its validity. Rather, they contend that the court of appeals erred in applying the principle to the particular facts of this case.

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[2]The government argued to the court of appeals, and here maintains, that *Park* concerned only the basis for liability of corporate officials for the criminal violations of their corporations. The defendant in *Park* had argued that he should not be held personally liable because it would have been impossible for him personally to inspect every store and warehouse to detect and correct all insanitary conditions. After holding that the Act imposes a duty "to implement measures that will insure that violations will not occur," this Court acknowledged that a corporate official could establish an "impossibility" defense by showing that he lacked the power in his capacity as an agent of the corporation to direct the corporation to take the necessary steps. 421 U.S. at 673. Petitioner Minoru Hata did not dispute that he personally had the power to direct all efforts the company made or could make to prevent or correct insanitary conditions in the warehouse. *Park* did not involve any question of general liability for violations of the Act when nothing short of ceasing all food operations will remedy the violations.

Although petitioners concede that they made no offer of proof of impossibility (Pet. 17), they assert that evidence offered for another purpose—and properly excluded because irrelevant to the issue for which they proferred it—should be considered as an offer of proof to support petitioner's impossibility theory. This is contrary to the general rule that a trial court's exclusion of evidence will not be overturned because it might have been admissible on another ground not urged at trial. Fed. R. Evid. 103(a). In any event, petitioners' evidence would not help their position, for it does not relate to impossibility. The evidence consists of photographs showing views of the cage taken four months after the violation occurred (Tr. 577-596; Pet. 16-17). Such photographs do not show that the condition could not have been corrected before the inspection; rather, they suggest a method by which that could have been done.

2. Petitioners contend that their constitutional rights were violated by the government's failure to present to the grand jury which indicted them a statement which they submitted at an administrative hearing in October 1972.[3] They characterize the statement as "exculpatory" and assert that exculpatory material cannot be withheld from a grand jury. The court of appeals held that the prosecution has no obligation to "present the grand jury with evidence it may have which would tend to negate guilt" (Pet. App. ix).

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[3]Section 305 of the Act, 21 U.S.C. 335, accords a potential defendant the right to present his views in such a proceeding *before* the Secretary reports a violation to the United States Attorney for criminal prosecution.

The court of appeals' decision is in accord with the decisions of other federal courts. See *Loraine* v. *United States*, 396 F. 2d 335, 339 (C.A. 9), certiorari denied, 393 U.S. 933; *Jack* v. *United States*, 409 F. 2d 522, 524 (C.A. 9); *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D. N.J.), affirmed, 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936, rehearing denied, 405 U.S. 1048. See also *United States* v. *Gardner*, 516 F. 2d 334, 339 (C.A. 7), certiorari denied, 423 U.S. 861.

Moreover, this case would not provide an appropriate occasion for reexamining the established federal rule. The petitioners' statement at the administrative hearing described the actions they took *after* the inspection to correct the insanitary conditions (Pet. 12-13). But post-violation efforts to correct the violation are not relevant to the issue: whether petitioners violated the Act by holding food in an insanitary warehouse at the time of the inspection.[4]

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[4]There is no suggestion here that the government withheld any exculpatory evidence from the defense. Cf. *Brady* v. *Maryland*, 373 U.S. 83; *United States* v. *Agurs*, No. 75-491, decided June 24, 1976. The evidence in question here was a statement by the petitioners themselves.

Petitioners' reliance upon the California Supreme Court decision in *Johnson* v. *Superior Court of San Joaquin County*, 15 Cal. 3d 248, 539 P. 2d 792, as a source of conflict is also misplaced. There is no conflict between *Johnson* and the decision below. The California Supreme Court found the duty to disclose exculpatory material in a state statute, not the Fifth Amendment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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